FILE COPY

In The

SUPREME COURT OF THE UNITED STATES

MAY TERM, 1960

No. ~~910~~ 79

MIKE MILANOVICH
AND
VIRGINIA MILANOVICH,
Petitioners

vs

UNITED STATES OF AMERICA
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

[redacted]

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BRIEF FOR THE PETITIONERS

To The Honorables, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioners, Mike Milanovich and Virginia Milanovich, pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit entered on the 8th day of April, 1960. Said opinion affirmed the judgment of the United States District Court for the Eastern District of Virginia, at Norfolk.

OPINION BELOW

The opinion of the Court of Appeals was affirmed, setting forth that the sentence on the receiving count will be vacated, but that does not require a reversal of the judgment.

JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1960. By order entered by this Court on April 4, 1960, the time of filing the petition for Writ of Certiorari was extended to May 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1.) The Court erred in failing to instruct the jury that a conviction would not be for both larceny and receiving stolen goods. This question is applicable to Virginia Milanovich as she alone was convicted of both offenses.

2.) The Court erred in failing to instruct the witnesses not to discuss their testimony.

STATUTE INVOLVED

18 U.S.C. 641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any prop-

erty made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

Petitioners seek a review of the judgment of the Court of Appeals affirming the conviction of Mike Milanovich on a count charging him with larceny of $14,788.78 on June 2, 1958, from the United States Naval Amphibious Base at Little Creek, Virginia. His wife, Virginia Milanovich, was convicted on the same count of larceny, and also on a count charging her with receiving stolen goods (i.e., the same $14,788.78) on June 2, 1958.

The evidence against the Milanovichs consisted chiefly of the testimony of three accomplices. It was revealed that they and their three accomplices had previously planned the robbery, that all five drove at night in Mike Milanovich's automobile to the Amphibious Base, and that the three accomplices actually broke into the commissary store on the base where they opened the safe, while the Milanovichs waited in their automobile outside the store. Because the theft took longer than had been anticipated, the Milanovichs left the base and did not wait, as had been planned, for their

confederates to finish. After leaving the commissary store, the three hid the stolen money in a nearby woods on the base, and then proceeded to a prearranged meeting place where Virginia Milanovich picked them up. It is not clear from the evidence exactly when, or by whom, the money was actually retrieved, but there was testimony that more than two weeks after the theft, Virginia Milanovich assisted in the counting of it. It was also disclosed that on June 19, 1958, a suitcase was found at the Milanovich home containing $500.00, allegedly part of the loot.

On the larceny count, Mike Milanovich was sentenced to five years imprisonment, while Virginia was sentenced to ten years. The court imposed on Virginia an additional sentence of five years for receiving stolen goods, to run concurrently with her ten year sentence for the larceny.

Throughout the lengthy trial the trial judge was asked to admonish the witnesses not to discuss their testimony, this the trial judge refused to do.

ARGUMENT

A. Convictions for Larceny and Receiving the Same Property

The crime of larceny and receiving are separate, distinct, and inconsistent offenses. The two crimes contemplate separate individuals performing entirely different roles; Heflin vs United States, 358 US 415 (1959); 2 Whartons' Criminal Law and Procedure (1957 ed) section 566.

It is a well established rule of law, that one who is guilty of larceny cannot also be guilty of receiving. The prosecu-

tion need not elect between counts, but such election is for the jury, upon proper instructions. By the affirmance of the conviction, the jury is deprived of its function to make the choice, and instead an appellate Court, in this case, has made the choice.

The choice should have been left to the jury, and since they might reasonably have convicted of receiving instead of larceny, and since a lesser sentence was imposed for receiving, this Court should not allow the greater sentence to stand.

It was held in Heflin (supra) that Congress did not intend to subject to double punishment a person who robbed a bank and received the profits of the robbery. The statute in question in this case is similar to the bank robbery statute and there appears to be no differences between the two statutes or their legislative histories justifying a different interpretation.

The jury, if allowed to consider the evidence presented under proper instructions could have found Virginia Milanovich guilty of receiving rather than of larceny. This then is a jury question and not one for the Court to determine.

B. Failure to instruct the Witnesses not to discuss their Testimony

The exclusion of the witnesses loses all of its value if they are not admonished not to discuss their testimony. This of course, is discretionary with the Court, but when it is brought to the Court's attention that the witnesses are

discussing their testimony with each other the request should be granted.

The manifest purpose of the rule being to secure trusts and promote the ends of justice and to have testimony of a witness uninfluenced with the testimony of other witnesses. (Roberts vs. State, 25 So. 238 240; 122 Ala. 47), and to prevent convert of action among witnesses (State vs. Pell, 119 N. W. 154, 140 Iowa 655).

In the case at bar, it was especially necessary to prevent at least the material witnesses from discussing their testimony. The defendants were contending through the entire trial that the charges against them were a frame-up, devised by the three alleged accomplices, Grimmer, Guerrieri, and Sofocleous, who had plead guilty and were the key government witnesses. That these witnesses had an opportunity to get together and collude is apparent by the record, and the affidavits that were filed in support of the motion for a new trial.

The failure of the Court to so instruct the witnesses deprived Mike and Virginia Milanovich of a fair and impartial trial.

CONCLUSION

WHEREFORE, petitioners respectfully pray that this petition be granted and that a Writ of Certiorari issue, directed to the United States Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Honorable Court for its review and determination the proceedings in the case Mike Milanovich and Virginia Milanovich, appellants vs United States of America, ap-

pellee, to the end that the judgment and opinion of said Court of Appeals may be reversed by this Honorable Court and a new trial granted the petitioners.

Petitioners further pray for such other and further relief in the premises as may seem proper and just.

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